United States Circuit Court of Appeals for the Ninth Circuit

KITSAP COUNTY TRANSPORTATION COMPANY, a corporation,
Appellant,

vs.

ELLA J. HARVEY, Claimant of the Gas Screw "Suquamish," her tackle, apparel, and furniture,
Appellee.

No. 4889

Brief of Appellee

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HON. GEORGE M. BOURQUIN, *Judge*

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ARGUMENT.

THE RIGHT TO LIMIT.

The appellee in answer to the petition in this case after alleging that the Steamer Suquamish upon which she was injured while being carried as a passenger was unseaworthy, defective, etc., denied the petitioner's right to a limitation of liability and also its right to an exoneration or exemp-

tion from liability. In paragraph six of her answer to the petition, appellee alleges:

> "That claimant in filing her claim in the above entitled cause and in answering the petition and libel of the petitioner does not intend to confer jurisdiction upon this court to hear and determine the said cause upon its merits for the reason that an action is now pending in the Superior Court of the State of Washington, for King County, in that said Cause No. 178602 entitled, "Ella J. Harvey, Plaintiff, vs. Kitsap County Transportation Company, a Corporation, Defendant," and unless by lapse of time and loss of witnesses it becomes necessary to submit plaintiff's claim and (13) demand to the above court in order that full justice may be done to claimant, and claimant makes this further answer, claim and demand to the said petition without prejudice to assert and maintaining its cause of action now pending in the Superior Court in the event plaintiff's petition for a limitation of liability be denied."

Throughout the record appellee pleaded for a dismissal of the case, claiming the right to prosecute her cause to its conclusion in the State Court.

Appellant now contends that it was not liable on the merits of the appellee's claim for damages for the reasons that:

1. That the vessel was properly built and equipped in every way and appellee was not injured by reason of any defect, etc., because there was no defect, in the vessel or hull, and it did not fail in the duty the carrier owes a passenger.

2. That appellee was herself guilty of such

contributory negligence as a matter of law as to defeat her claim for damages. These in substance are the contentions of the appellant on the merits of Mrs. Harvey's damage suit, which is now pending in the state court. This is a single claim case. Appellant filed its petition to limit liability after the Harvey suit had been filed in the state court.

Appellant in the court below, as here, asked for decree in its favor notwithstanding the obvious privity and knowledge which it had of the very condition of the aisle, seat platform, and seating arrangement which Mrs. Harvey complained of as causing her injuries.

On this appeal petitioner comes forward with the unique proposition that it is the duty of the court of admiralty in a limitation proceeding to first ascertain whether the petitioner is liable on the claim against which limitation is sought for if it is not liable the right to limit must follow.

This is a curious position in view of the limited (using the word wholly apart from the limitation statutes) purpose of the statutory remedy of limitation. It appears, however, to be supported by the decision in the second circuit in the Bouker case referred to in appellant's brief.

Appellant says in speaking of the decision of Judge Bourquin in this case:

> "We think this error was induced from a fundamental misconception of the learned trial court in regard to its province, duty, and jurisdiction in proceedings to limit liability. We

believe it is manifest that the first thing to be decided is: Was the petitioner guilty of negligence?

"And second, did the petitioner comply with the laws of the United States so as to entitle it to a limitation of its liability if it was guilty of negligence? If it was not guilty of negligence it is entitled to a limitation of liability as a matter of course because it has no liability whatever and the limit must be zero."

As the limitation statutes have been extended to debts and non-maritime claims the question now is whether in any limitation proceeding the first inquiry should be upon the merits of the claims or demands against which petitioner seeks to limit his liability, without regard to his own conduct or duty in furnishing a seaworthy ship and in being personally without knowledge or privity of the debt, embezzlement, loss, damage, etc., which furnishes the basis of the proceeding and against which the limitation is sought. Opposing this contention appellee insists that the petitioner in every case must first show that it or he was without privity or knowledge of the facts or circumstances upon which the debt, demand, injury or tort rests.

The statute limiting liability is—R. S. 4283:

"The liability of the owner of a vessel * * * * for loss * * * * occasioned or incurred without the privity or knowledge of such owner * * * * shall in no case exceed," etc.

The statute was passed for the protection

against losses greater than the value of the owner's ship. The right was based on the owner's lack of privity or knowledge of the circumstances of the disaster.

Congress attached one condition and the general maritime law imposed the other. Congress made it a condition precedent to this relief that the owner should be without privity or knowledge of the circumstances of the loss. The maritime law and the navigation laws required of the owner that he must furnish a seaworthy vessel properly equipped and manned or he could not limit. The maritime law by implication said that the owner could not be without privity or knowledge of the condition of his ship at the commencement of the voyage.

This is what the maritime law, the United States Navigation laws and the section 4283 exacted of the owner in exchange for the limitation privilege.

The court is without jurisdiction to entertain a petition unless the petitioner alleges lack of privity and proves it.

The act although not to be construed so as to defeat its beneficial purpose is in derogation of existing legal rights and remedies and so is strictly construed.

The Supreme Court so held in the case of *The Main vs. Williams,* 152 U. S. 122—38 L. Ed. 381 at 385.

"The English Courts have held, very properly we think, that these statutes should be strictly construed. As observed by Abbott, Ch. J., in *Gale v. Laurie,* 5 Barn. and C. 156, 164: 'Their effect, however, is to take away or abridge the right of recovering damages, enjoyed by the subjects of this country, at the common law, and there is nothing to require a construction more favorable to the ship owner than the plain meaning of the word imports.' To the same effect are the remarks of Sir Robert Phillimore in *THE ANDALUSIAN,* 3 Prob. Div. 182, 190, and in *THE NORTHUMBRIA,* L. R. 3 Adm. 6, 13. Speaking of this statute, Lord Justice Brett in *Chapman vs. Royal Netherlands Steam Navigation Co.,* L. R. 4 Prob. Div. 157, 184, remarked: 'A statute for the purpose of public policy, derogating to the extent of injustice, from the legal rights of individual parties, should be so construed as to do the least possible injustice. This statute, whenever applied, must derogate from the direct right of the ship owner against the other ship owner, * * * * It should be so construed as to derogate as little as is possible consistently with its phraseology, from the otherwise legal rights of the parties'."

From the language of the Act, the right to limit is made to depend upon this particular condition, viz.—was the owner without privity or knowledge? If he was he may limit; otherwise he cannot.

The arrangement of the text makes the privity or knowledge of the owner a condition precedent to the grant of the right. We need not look beyond the language of the text. If we disregard, however, the particular text arrangement and ex-

amine the limitation statutes with reference to their purpose, the rights they create, and the condition of the claimants and shipowner at the common law is considered apart from the proceeding in admiralty which permits him to limit in certain cases, it is clear beyond any question that the first inquiry in a limitation proceeding is whether the owner is without privity or knowledge in all cases where the allegation of the petition as to the lack of privity or knowledge is denied by the answering claimant.

The petitioner here was sued in the State Court for damages for personal injury. Plaintiff in that court under the "Saving Clause" of the Federal Judiciary Act was entitled to a jury trial.

To defeat this right of jury trial in the State Court petitioner filed its limitation petition and contended below, as here that it is entitled by the mere filing of its petition and the taking of the attendant formal steps as to appraisal, etc. to have the United States District Court sitting in Admiralty first pass on the merits of Appellee's pending case in the Superior Court of Washington for King County, to-wit: the questions of negligence and damage, before considering the question whether petitioner is entitled to limit his liability.

In other words petitioner would prevent a jury trial and substitute for a verdict on the issues of damage and negligence the opinion and judgment of a Federal Judge, before he makes the neces-

sary showing in the matter of privity and knowledge.

And if Appellant's position is sound it can compel the claimant to litigate the question of negligence and damage or the circumstances of the breach of contract, debt, default or tort against the ship owner before ever considering the shipowner's right to limit liability. If this is the law a beneficial statute designed for relief of shipowners in certain cases where great hardship would otherwise occur, has become the instrument of designing owners to defeat trials by jury and to compel the adjudication of all claims, demand, debts, embezzlement, breaches of contract and non-maritime torts, etc., in the United States District Court in Admiralty instead of allowing a proper adjudication of such cases before a State Court under the Savings Act, unless the vessel owner brings himself within the limitation statute by showing his lack of privity or knowledge.

The grant of judicial power to the United States was extended to all causes "of admiralty and maritime jurisdiction" by the Constitution. Congress, however, in 1789 in the first judiciary Act preserved to suitors in maritime causes a remedy at common law where the common law was competent to give it. The reason for this failure to take all maritime causes away from the State Courts is clear. The people of the colonies had surrendered reluctantly to Federal control. They

had confidence in their own sovereign courts and were uncertain and doubtful of the new jurisdiction of the National government. The first congress ~~in conferring~~ granted the right to litigate maritime cases in the State Courts in all cases where the common law was competent to afford a remedy and it always had been competent to litigate maritime causes in tort or contract in the colonial courts and in the courts of Kings Bench in England as long as they remained transitory actions between persons and did not attempt to proceed in *rem* against the vessel.

And Congress has not changed the Act in this respect. It still believes that litigants should prosecute admiralty and maritime causes in the Courts of the state before juries rather than in the Federal Court before an admiralty judge if the litigant so desires. See Judicial Code Sec. 24, Sub. Div. 3.

And this right cannot be taken away by the artful device of filing a limitation proceeding in the United States Court, so that the national court will hear and determine the question of liability, negligence, damage or debt as the case may be, quite without regard to the question of the petitioner's lack of privity or knowledge.

The error in the Bouker case is apparent when we apply the limitation statutes of today to a non-maritime tort or claim. The limitation sections now cover such cases. See *Richardson vs. Harmon,* 222 U. S. 96, 56 L. Ed. 110.

What then must follow where a limitation proceeding is brought upon a non-maritime claim if the Bouker case idea is carried out? The District Court gravely sits to hear a case in which it has no possible jurisdiction but for the fact that a petition has been filed in the admiralty asking for a limitation. It proceeds with equal gravity and deliberation to pass upon and determine the merits of a non-maritime claim in which there is not even a concurrent jurisdiction in the Federal Court. The non-maritime tort is before the court merely because it is an incident to a special jurisdiction taken out of the "Savings Clause" and conferred exclusively upon the District Court for the benefit of the American ship-owner, to relieve him from hardship or disaster at sea when he, the ship-owner, has shown himself to be without privity to the disaster.

The underlying thought in limitation statutes which prompted their enactment here and in other countries was—if the ship-owner has furnished a seaworthy ship, properly equipped and manned and has sent her out on the high seas where he cannot maintain or exercise that control over his plant, works, ways, machinery or employees which a master or proprietor can and does upon land where the whole enterprise is open to his inspection and control day or night, he, the ship-owner, ought to be relieved of the effects of a maritime disaster which might otherwise overwhelm him.

And to obtain the benefit of this special, and

we insist, limited jurisdiction in the United States District Court the petitioner may stop all other proceeding by his petition in the district court to obtain this special relief, but he may not get this relief until he has shown himself to be within the small class of special persons entitled to it, viz.: those who, owning ships, are sought to be made liable for an amount greater than the value of their vessel and they (the owners) are without privity or knowledge of the causes of the disaster.

Otherwise the District Court in admiralty can be made to hear all cases against ship-owners provided only the amount demanded is greater than the appraised value of the ship and covers a liability, maritime or non-maritime, as the case may be, arising or incurred during a voyage.

Carrying out the plan upon which appellant contends should be followed, in the case at bar, it argues the question of negligence and attempts to its own satisfaction to demonstrate that as petitioner was not negligent in the premises it is entitled to limit liability as a matter of right in the District Court.

In answer to this claim appellee contends that inasmuch as the proximate cause of the injury is and was a condition of the hull which the owner was at all times since the vessel was built, privy to and of which appellant had full knowledge, it cannot limit and the court is without jurisdiction to go further.

In the language of Judge Bourquin:

> "Now in the instant proceedings it is very clear that if claimant is entitled to recover it is because of a condition of the hull of the vessel, which was actually created and maintained by petitioner."

It is idle to argue that petitioner was not privy to and had no knowledge of the actual occurrence. The petitioner was operating a vessel which it had built and maintained in the passenger service upon the navigable waters of the State for many years. The proximate cause of the injury was alleged to be the defective build and construction of the platform. This allegation was proven at the trial below. In fact, the pleadings admit it.

Plaintiff sitting in a seat which was one of several in narrow rows, fell into the aisle from the platform where the seats were located while attempting to leave the seat when the vessel came to land. The issue of negligence was whether the construction of the seats on a raised platform above the center was a defect in the hull of the vessel within the meaning of Section 4493 of the Revised Statutes, and its maintenance in that condition a breach of the high duty owed by the carrier to use the greatest care in carrying passengers under the general law.

Such it was—this very physical condition which was made the basis of complaint in the state court was created by the act, design, intention, privity and knowledge of the owner-petitioner and it is not

open to any possible claim or suggestion to the contrary. This brings us back again to the inquiry—Can the petitioner deprive appellee of her right to submit this question of vessel construction and maintenance of passenger accommodations as a condition of negligence or non-negligence, as the case may be, to the judge and jury of the state court?

The state court might do several things in the case if it should be submitted to it. It might grant a non-suit because it might decide as a matter of law that it was not such a defect in the hull of a vessel as to bring the case under R. S. 4493. It might hold the appellee plaintiff guilty of such gross or willful negligence as to defeat her claim entirely, notwithstanding the defective condition of the vessel. It might divide the damages as a matter of law or it might submit the whole issue to a jury but *inasmuch as the very condition alleged to have caused the injury* in violation of a carrier's duty to a passenger and in disregard of the duty imposed upon a vessel owner by Section 4493 R. S., was created by the petitioner, would on the face of the proceeding preclude the petitioner from relief in the District Court when the right to limit is denied by claimant.

We might add further such a procedure would impose an endless burden upon the District Court, all of which could be avoided by directing the first inquiry to the question of privity or knowledge.

The point under consideration has been settled

in appellee's favor by the District Court in *The Erie Lighter,* 108, 250 Fed. 490 at 493, where the court said:

> "It is necessary, primarily, to determine whether the petitioner is entitled to limit its liability. If it is, this court may undoubtedly proceed to determine whether it is liable at all, and if so, to fix and assess the damages that should be awarded to the claimant. That is what the Supreme Court rules sought to accomplish. *The Benefactor,* 103 U. S. 239, 26 L. Ed. 351; *Providence & N. Y. S. S. Co. vs. Hill Mfg. Co.,* 109 U. S. 578, 592, 595, 602, 3 Sup. Ct. 379, 617, 27 L. Ed. 1038; *Butler vs. Boston S. S. Co.,* 130 U. S. 527, 552, 9 Sup. Ct. 612, 32 L. Ed. 1017; *White vs. Island Transportation Co.,* 233 U. S. 346, 34 Sup. Ct. 589, 58 L. Ed. 993; *The Annie Faxon* (D. C. Wash.), 66 Fed. 575, 577, affirmed 75 Fed. 312, 21 C. C. A. 366 (C. C. A. 9th Cir.); *Quinlan vs. Pew,* 56 Fed. 111, 5 C. C. A. 438 (C. C. A. 1st Cir.). On the other hand, if the petitioner may not avail itself of the limited liability statutes, it would seem, both on authority and reason, that, at least without claimant's consent this court is without jurisdiction to proceed further but must dismiss the proceeding, leaving the claimant free to pursue his remedy in the courts of New Jersey. It was expressly so held by the Circuit Court of Appeals of the First Circuit in *Quinlan vs. Pew,* 56 Fed. 111, 5 C. C. A. 438. Such also is the necessary conclusion to be drawn from the disposition which was made of such proceedings, when the owners were held not to be entitled to limit their liability, in *Weisshar vs. Kimball S. S. Co.,* 128 Fed. 397, 63 C. C. A. 139, 65 L. R. A. 84 (C. C. A. 9th Cir.); *Parsons vs. Empire Transp. Co.,* 111 Fed. 202, 49 C. C. A. 302 (C. C. A. 9th Cir.); *In re Myers Excursion & Navigation Co.* (D. C. S. D. N. Y.), 57 Fed.

240, affirmed sub nom. *The Republic,* 61 Fed. 109, 9 C. C. A. 386 (C. C. A. 2d Cir.). It was also held in *The Dauntless* (D. C. N. D. Cal.), 212 Fed. 455, affirmed sub nom. *Shipowners' & Merchants' Tugboat Co. vs. Hammond Lumber Co.,* 218 Fed. 161, 134 C. C. A. 575 (C. C. A. 9th Cir.), that, where there is but a single claim and the value of the vessel exceeds the amount of the claim, the petition for limitation of liability should be dismissed and the claimant permitted to prosecute his action in the state court. A person who has a cause of action of admiralty cognizance has always been entitled to seek his remedy in either the common-law courts, where they are competent to give it, or in the admiralty courts (Judiciary Act of 1789, Sec. 9, 1 Stat. L. 76; Judicial Code of 1911, Secs. 24, 256 (Comp. St. 1916, Secs. 991, 1233).

It is not to be presumed, therefore, that the Supreme Court, in adopting the rules of practice for limited liability cases, intended to override the provisions of the last mentioned statutes in cases where there was no right in an owner to limit his liability. The purpose of the rules is set forth in *Providence & N. Y. S. S. Co. vs. Hill Mfg. Co., supra,* 109 U. S. at 594, 3 Sup. Ct. 379, 617, 27 L. Ed. 1038. It is true that rule 56 permits an owner to assert, not only his right to limitation of liability, but also his exemption from all liability; but this was incorporated, as pointed out in that case and in *The Benefactor, supra,* to overcome the hardship of the English rules of practice which required an owner, seeking the benefit of the limited liability law, to first confess general liability. The only ground for an owner to come into admiralty is because of his asserted right to limit his liability. If it is found that he is not entitled to that right, for the court to go further and determine general liability, etc.,

> would be to deprive a claimant of the choice of forums given to him by the statute and deprive him of his right to trial by jury. This is an important consideration, as a great many limited liability cases, since the decision in *White vs. Island Transp. Co.,* 233 U. S. 346, 34 Sup. Ct. 589, 58 L. Ed. 993, deal only with a single claim arising out of personal injury."

In re *Pacific Mail S. S. Co.,* 130 Fed. 76 at 80, 9th Circuit, this court recognizes this principle. The court below limited liability. Each side appealed. Claimant contended that petitioner was not entitled to limit because of unseaworthy ship. Petitioner was not satisfied with the limitation decree, and appealed to obtain a greater limitation. This court denied the right to petitioner to limit at all and reversed the lower court because the petitioner had not furnished a seaworthy ship properly manned, and was privy to the cause of disaster. Judge Ross said in speaking of the question of the right to limit:

> "It is apparent that, if this position of the claimants is well founded, the petitioner is not entitled to any limitation of its liability, the questions presented on its appeal become immaterial, and the claimants to whom damages were awarded by the court below will be entitled to judgment for the full amounts so awarded them, together with their costs, whether the voyage on which the disaster occurred should include the round trip from San Francisco to Hongkong and back, as contended on the part of the claimants, or is limited to the return trip from Hongkong to San Francisco, as contended on the part of the petitioner."

Finally there is a statement in the opinion in *Richardson vs. Harmon, supra,* which adds strength to our position.

The court in discussing section 18 of the Act of June 26th, 1884, refers to the state of the law before its enactment where it held there was no jurisdiction in the District Court to try a case of fire on land communicated by the ship or from a collision between a ship and a structure on land. The court said:

> "The tort in both cases would have been non-maritime."

The court then concludes that the necessary effect of Section 18 of the Act of June 26th, 1884, was to extend the right to limit liability for every kind of loss, damage and injury but adds with considerable emphasis, we think, a statement sustaining our view of the Act—we quote from *Richardson vs. Harmon,* as follows:

> "Neither is it necessary to conclude that the section (Sec. 18, Act of June 26th, 1884) in question is a repealing act as to any of the qualifications of the preceding limitations found in Sections 4283 et. seq. of the Revised Statutes. To so hold would be to attribute to Congress a wider purpose than we have any reason to suppose—that of extending the benefit of Sections 4283 et. seq. *regardless of the owner's knowledge or privity.* That would be to throw the section out of correspondence with the existing limitations."

We have underscored the language *"regardless of the owner's knowledge or privity,"* for it clearly

appears that petitioner may get the benefit of the limitation act regardless of its privity if appellant can induce this court to follow its procedure contended for, viz.: to try the issue of negligence or defective hull in this court before establishing its right to limit because of its lack of privity or knowledge of the condition causing the appellee's injury, thereby depriving us of the right to trial by jury.

We therefore respectfully submit that this court is without jurisdiction to proceed further because of the obvious privity and knowledge which appellant had of the very condition which proximately caused her injury. The judgment of the District Court should be affirmed.

ARGUMENT ON MERITS.

Without prejudice to our cause as pleaded and argued wherein we deny the right of the District Court and of this court to hear the cause on its merits or to make any adjudication as to the negligence or non-negligence of the owner and claimant, or to consider the case further, we, of course, recognize the jurisdiction of this court to deal fully with every phase of this case if on the record the court can uphold appellant's plan of procedure or it can say as a matter of law, that the appellant was without privity or knowledge of the cause of appellee's injury.

The Liability of Appellant.

The first inquiry on the facts is—

What was the proximate cause or causes of the injury? It clearly appears that there were two, the principal one being the defective condition of the hull and the other the failure to place warning signs in and about the cabin and seating place.

The primary and principal cause was the defective and unseaworthy condition of the hull in its adaptation to the passenger service, although there was also a failure on the part of the petitioner to warn its passengers of this condition and this failure consistently followed on the part of the appellant, for many years was a grave breach of duty which was sufficient to hold the appellant when we consider the obligation which the carrier of passengers assumes with respect to its passengers. In neither one of these situations could petitioner limit because each was of long standing with the full knowledge of privity, and active consent and approval of appellant.

The Facts.

Mrs. Harvey was 75 years of age when she went on board the appellant's vessel at Seattle to be carried as a passenger across Puget Sound to Manitou Beach, paying the regular tariff fare enacted by appellant for such transportation. She went to the ladies' cabin, a photograph of which is Petitioner's (appellant's) Exhibit 2, page 108 of

apostles on appeal brief. She occupied a seat which was furnished for her accommodation. This seat, as shown by the photograph, was placed at the edge of the platform which was raised about ten inches above the floor of the aisle. The seats were of the public hall type, metal seats in narrow rows, seating two persons in each row on each side of the aisle, the rows extending at right angles to the keel. These rows were twenty-nine inches apart. The appellee entered the seat, remained there during the trip or run, which took about an hour. In attempting to leave her seat, and while rising and stepping from her seat ino the aisle she fell forward and downward to the aisle floor, sustaining very severe injuries. Her act was due to her momentary forgetfulness. She occupied an aisle seat, to use a theatre box office term. No step or ledge was provided to step on after leaving the seat. A sheer drop of ten inches was within an inch or two of the passenger's foot after the passenger had risen in the seat for the purpose of stepping out from between the seats. In stepping out from the seats, the passenger had at all times to remember that the sheer drop of ten inches was within an inch or so of his foot, even if he wasn't standing on the edge of the platform. True enough, if one charged his or her memory with the fact of the drop and cautiously stepped out from the seats with due regard for the drop and carefully stepped down from the seat platform to the aisle there was no danger. But is a passenger to be on his guard at all times

when using a part of the vessel especially set aside for his or her use and convenience? Momentary forgetfulness is excusable in these circumstances. There was much to engage one's attention in looking out on the water. Much stress was laid on the view obtained by raising the seat platform. The matter of the use of the seat and momentary forgetfulness is emphasized when we consider the appellee's age and the fact that her long skirts and long heavy coat (this lady was not of the ultra modern kind in her dress) tended to obscure the sheer drop at the seat edge, and the narrow space between the seats, all of these factors favor the contention that it was not a gross or even unexcusable fault on part of appellee. A cautious person acting with due regard to her own safety might have suffered a similar injury in leaving the seat.

~~Marine~~ Carriers of Passengers.

Can there be any doubt as to the fault of the owner of the vessel?

In answering this question we must keep in mind first that in this case there is no rule of contributory negligence which operates as a bar to a recovery.

This case whether tried in a state court under the Saving Clause or in admiralty is a maritime case, based on a maritime tort. The rule of divided damages must apply. In other words as in a collision case fault is either sole or mutual.

Disregard the question of appellee's fault. Was the petitioner not at fault in providing a structure which would permit one to fall in such a manner? In answering this question much depends upon the use of the platform and the duty imposed upon the owner of the vessel by our navigation laws. The pertinent parts of section 4493 of the Revised Statutes is—

> "Whenever damages is sustained by any passenger from explosion, fire, collision or other cause the master and the owner of such vessel * * * shall be liable to each and every person so injured to the full amount of damage if it happens * * * through known defects or imperfections of the steaming apparatus or of the hull."

The statute is only declaratory of the common law and the maritime law. The common law obligation is expressed clearly and simply in *Pennsylvania Company vs. Roy,* 102 U. S. 12 Otto, 451 and 26 L. Ed. 141, as follows:

> "These and many other adjudged cases, cited with approval in elementary treatises of acknowledged authority, show that the carrier is required, as to passengers, to observe the utmost caution characteristic of very careful, prudent men. He is responsible for injuries received by passengers in the course of their transportation which might have been avoided or guarded against by the exercise upon his part of extraordinary vigilance, aided by the highest skill. And this caution and vigilance must necessarily be extended to all of the agencies or means employed by the carrier in the transportation of the passenger. Among the

duties resting upon him is the important one of providing cars or vehicles adequate, that is, sufficiently secure as to strength and the other requisites, for the safe conveyance of passengers. That duty the law enforces with great strictness. For the slightest negligence or fault in this regard, from which injury results to the passenger, the carrier is liable in damages. These doctrines to which the courts, with few exceptions, have given a firm and steady support, and which it is neither wise nor just to disturb or question, would, however, lose much, if not all, of their practical value, if carriers are permitted to escape responsibility upon the ground that the cars or vehicles used by them and from whose insufficiency injury has resulted to the passenger, belong to others."

The duty to use the utmost care, so far as human skill and foresight can go rests upon the carrier of passengers. See *"Carriers,"* R. C. L., Sec. 582. The duty of all common carriers to provide passengers with usual reasonable accommodations includes furnishing seats. See *Carriers,* 4 R. C. L., Sec. 526.

"As far as human care and foresight can go," is a familiar form of stating the duty. *Stokes vs. Saltonstall,* 13 Peters 181, 10 L. Ed. 115.

See also *Shoemaker vs. Kingsbury,* 79 U. S. 12 Wall 369, 20 L. Ed. 432.

The rule laid down in 10 *Corpus Juris* 854 was adopted by this court in the *Korea Maru* in 254 Fed. 397 as furnishing a comprehensive statement of the duty which a carrier owes to a passenger.

In an earlier case, *The Oregon,* 133 Fed. 609, this court examined the question at length and held the owners to a very high degree of care.

The Maritime Carrier.

The Oregon, supra, is also authority for the statement that the maritime law imposes the same high degree of care respecting the duty to the carrier and the kind of ship it shall furnish for the carriage. This court said in the *Oregon* case:

> "In the leading case of *Stokes vs. Saltonstall,* 13 Pet. 181, 191, 10 L. Ed. 115, the distinction between these two classes of contracts is stated by the Supreme Court of the United States as follows:
>
> 'It is certainly a sound principle that a contract to carry passengers differs from a contract to carry goods. For the goods the carrier is answerable, at all events, except the act of God and the public enemy. But although he does not warrant the safety of the passengers at all events, yet his undertaking and liability as to them go to this extent: that he or his agent, if, as in this case, he acts by agent, shall possess competent skill; and that, so far as human care and foresight can go, he will transport them safely.'
>
> In the case of the *Liverpool Steam Co. vs. Phenix Ins. Co.,* 129 U. S. 397, 440, 9 Sup. Ct. 469, 471, 32 L. Ed. 788, Mr. Justice Gray, speaking for the court, refers to this distinction in the following language:
>
> 'The fundamental principle upon which the law of common carriers was established was to

secure the utmost care and diligence in the performance of their duties. That end was affected in regard to goods by charging the common carrier as an insurer, and in regard to passengers by exacting the highest degree of carefulness and diligence.'

Among the implied obligations assumed by the carrier of goods by sea is the warranty of the shipowner that the vessel in which the goods are carried is in a seaworthy condition when she commences her voyage. In this warranty the ship owner undertakes responsibility for any defects in the ship or her machinery or equipment, even for defects not discernible by careful examination. *Carver's Carriage by Sea,* Sec. 17.

In *Work vs. Leathers,* 97 U. S. 379, 24 L. Ed. 1012, the Supreme Court stated the rule to be as follows:

'Where the owner of a vessel charters her or offers her for freight, he is bound to see that she is seaworthy, and suitable for the service in which she is to be employed. If there be defects known or not known, he is not excused. He is obliged to keep her in proper repair, unless prevented by perils of the sea or unavoidable accident. Such is the implied contract where the contrary does not appear.'

In the *Edwin I. Morrison,* 153 U. S. 199, 210, 14 Sup. Ct. 823, 825, 38 L. Ed. 688, the language of Mr. Justice Gray, delivering the opinion in the same case in the Circuit Court, was quoted with approval, to this effect:

'In every contract for the carriage of goods by sea, unless otherwise expressly stipulated, there is a warranty on the part of the shipowner that the ship is seaworthy at the time of the beginning of her voyage, and not merely that he does not know her to be unseaworthy, or

that he has used his best efforts to make her seaworthy. The warranty is absolute that the ship is or shall be in fact seaworthy at that time, and does not depend on his knowledge or ignorance, his care or his negligence.'

This statement of the rule is again quoted and reaffirmed in *The Caledonia,* 157 U. S. 124, 130, 15 Sup. Ct. 537, 39 L. Ed. 644.

The carrier of passengers, either by land or sea, does not assume this responsibility. *Abbott's Law of Merchant Shipping* (13th Ed.) p. 208; *McPadden vs. New York Central R. R. Co.,* 44 N. Y. 478, 4 A. M. Rep. 705; 5 *Am. & Eng. Enc. of Law* (2d Ed.) 480; 6 *Cyc.* 591. But, instead of this warranty, he is held to a very high degree of care, prudence, and foresight. When a carrier undertakes to convey persons by the powerful, but dangerous, agency of steam, public policy and safety require that he should be held to the greatest possible care and diligence. The personal safety of the passengers should not be left to the sport of chance or the negligence of careless servants. Any negligence in such a case may well deserve the epithet 'gross'. *Philadelphia & Reading R. R. Co. vs. Derby,* 55 U. S. (14 How.) 468, 485, 14 L. Ed. 502."

The maritime law requires the shipowner in cargo cases to furnish a seaworthy ship properly manned and equipped. There is an implied warranty in every undertaking respecting the cargo. In the carriage of passengers while there may be no technical warranty, the high duty of doing the utmost for the safety and protection of the passenger which human skill and endeavor can do or suggest is the fair equivalent of the implied warranty and fitness in cargo cases.

And this high duty to passengers extends to the ship and her appurtenances and fixtures. And if there were a doubt about it, Congress has given the traveling public on American ships the definite assurance that seaworthy hulls free from defects and imperfections shall be used.

At least the ship owner will use defective or imperfect hulls at his peril because of section 4493.

And if the shipowner does not furnish a seaworthy ship properly equipped and manned he may not have a limitation which is but another way of saying that section 4493 bars the shipowner from limitation relief. There is only one qualification to this statement. The Supreme Court having said that sections 4283 and 4493 are to be understood together and that one does not repeal the other, it is probably correct to say that the shipowner who furnishes a vessel which is defective or imperfect in some particular may still limit his liability if he is without privity or knowledge of the defectve condition.

This distinction is made in the *Annie Faxon* case, 75 Fed. 312, in this circuit. There are not many cases where the owner will be able to escape the consequences of defective hulls and boilers. He did so in the *Faxon* case, and the special circumstances of the case may relieve owners in other cases.

It is difficult to perceive a situation where the owner can design, build and for ten years maintain

a vessel in a defective condition and escape the effect of the requirement that he shall be without privity or knowledge of the defective condition which has caused the injury.

In view of these rules, shall the owner in this case be discharged from liability and held blameless?

If so, then the words of the statute "known defects and imperfections" have little meaning or weight. Why was the word "imperfections" added to the word "defects"? Why was it stated disjunctively if not to cover different classes and yet not defective. It must have been understood in Congress as covering not only defective hulls, but those which because of poor adaptation or lack of fitness for the particular trade or use were insufficient or imperfect. In other words, if a passenger is injured and this injury happens through the use of an imperfect hull which was so known to the owner he shall be liable for the full amount of such damage, according to the mandate of the statute.

In the instant case, the passenger was injured because she forgot momentarily to step down from the platform upon the edge of which the seat rested. If the seats had been placed on the same level as the aisle the injury would not have occurred in the manner in which it is known to have occurred, without regard to the state of mind of the passenger, i. e. without regard to whether she was free from culpable fault. It did happen because the passenger not remembering for the time being the

sheer drop from the seat plaform to the floor of the aisle stepped into space instead of upon a firm and safe foundation. The drop, the size of the seats, the lack of space between rows, the long clothing, the failure to warn, all unite to establish a condition of trap and danger. Is the maintenance of such a condition consistent with the statute? Is it consistent with that high degree of care the carrier is required to exercise? Is it using the highest degree of care that human foresight can use or prudence can suggest to guard the passenger against injury or damage? Is it furnishing a ship which had her cabin seats and floor *perfectly* arranged? Is it furnishing a ship fit for the purpose intended, viz: the safe carriage of passengers? Is such a ship so poorly adapted to the carriage of passengers seaworthy? Does not the occurrence of the injury in itself furnish a negative answer to these inquiries?

Such a condition is condemned by nearly all of the safety standards adapted by the Public Service Agencies in the country. Floors and hallways, walking or working places shall be on the same horizontal level.

SUMMARY.

In concluding our argument before making a brief statement as to appellant's authorities we urge the court—

To dismiss the appeal and affirm the decree of the court below because,

;——The record shows conclusively that the efficient and proximate cause of appellee's injury was due to the physical condition of the vessel which appellant created and had for years knowingly and intentionally maintained.

In these circumstances appellant was not without privity or knowledge and could not therefore limit its liability.

;——The record conclusively and affirmatively showed appellant's privity and knowledge.

;——Appellant failing to show lack of privity and knowledge cannot have a limitation of liability without regard to the principal question of negligence or *defective or imperfect hull.*

The court below as here is without jurisdiction to pass upon or make any adjudication as to negligence in the absence of a showing as to lack of privity or knowledge.

Appellee when not submitting to the jurisdiction of this court cannot be deprived of a jury trial in the state court until the petitioner for limitation among other jurisdictional requirements can show lack of privity or knowledge.

If a Limitation Is Granted.

Even assuming for the sake of argument that the court might require proof of negligence, along with the question of privity, etc., considering the state of the law and the specific requirement of the statute, gross negligence was shown, viz:

a. The injury would not have happened in the manner it did happen except for the sheer drop from platform to aisle, and the narrow seats placed on the edge of the platform.

b. The failure to warn of a condition of inherent or potential danger.

If in any circumstances the court can grant a limitation, the court surely cannot excuse and relieve the carrier,—even if appellee was herself partly at fault, because the law of divided damages applies. To hold otherwise is to say that there was nothing of an imperfect or defective condition in the arrangement of the floor and seats notwithstanding this very condition caused the appellee to fall, break her hip and sustain permanent severe injuries.

All of these suggestions are without prejudice to our position that quite without regard to the question of negligence or defective or *imperfect* hull this court was without jurisdiction to proceed further when it appeared that appellant created the very condition which proximately caused the injury.

DIVIDED LIABILITY IN MARITIME CASE FOR DAMAGES.

The division of damages plays an important part on the question of negligence. The carrier cannot escape even if the passenger was guilty of negligence if the carrier's negligence operated as a contributing fault.

The court is entirely familiar with the rule of divided damages as laid down in the *Max Morris,* 137 U. S., 34 L. Ed. 586, and followed many times since. The only question is, does it apply as well to the relation of carrier and passenger as to stevedore and ship.

In *The Tourist,* 265 Fed. 700, in the District Court of Maine, Judge Hall thought it did, saying:

> "I do not find any cases reported where the rule has been applied in case of injury to a passenger on a ship. But I can see no reason why it shall not be so applied. In such cases the reasoning of Judge Addison Brown is clearly applicable, and the decisions admiralty courts have sustained his conclusion, that the 'public good is clearly best promoted by holding vessels liable to bear some parts of the actual pecuniary loss where their fault is clear provided that the libellants fault though evident is neither wilful, nor gross, nor inexcusable.' "

In the later case of *The North Star,* decided June 23rd, 1925, reported in 1925 Amc. 1085, the damages in a passenger and carrier negligence case were divided by the District Court of Massachusetts.

ANSWER TO SPECIFIC STATEMENTS OF APPELLANT.

Appellant states that petitioner's witnesses all stated that the Suquamish was built like all other vessels of her class. This statement is not borne out by the record.

In cross examination by Mr. Martin at pp. 46 and 47, L. H. Collidge said:

"Q. How many vessels of this type are on the Sound?

A. I could not say.

Q. Somewhere around a hundred?

A. Possibly so. (See page 47 Tr.)"

When asked to name vessels of the Suquamish type which had a center aisle with a raised seat platform ten inches on each side, Mr. Collidge answered "Three, I believe." (See Tr. p. 46.)

Frederick S. Brinton named three vessels of the Suquamish size and type which had the raised platform and sunken aisle. He was asked:

"Q. There are several of the small vessels 60 to 100 feet long on the Sound?

A. A large number, yes." (See Tr. p. 53.)

Taylor, for petitioner, when cross-examined admitted there were many vessels of the Suquamish type on the Sound but could only name three with the sunken aisle and raised seat platform. (See Tr. pp. 57, 58 and 59.)

J. L. Anderson, for appellant, at p. 62 Tr., said there were a great many vessels of the Suquamish type operating in the passenger service on the Sound.

"Q. You find as many one way as you will the other?

A. Yes."

These questions and answers furnish a complete denial of the claim that the Suquamish was built with sunken aisle and raised platform for seats in conformity with an established type of construction in those particulars.

It would have been easy to show this fact if it was true that the sunken aisle with raised seat and platform on each side was a common type. Appellant's witnesses named three out of a large number, which was said by one of its witnesses to be possibly 100.

It says that the cabin floor, aisle and platform was not part of the hull. It surely wasn't part of the engine, masts or rigging.

Appellant in drafting its petition was evidently not familiar with the terms of R. S. 4493, and did not appreciate the importance of making it appear that the sunken aisle and raised seat platform were not part of the hull, for it alleged in the petition for a limitation of liability in paragraph II, page 6 of the Transcript of Record—

"A suit thereupon has been brought as hereinafter more fully set forth on account of defects in the said vessel * * *."

In the next following paragraph (p. 6 Tr.), numbered III—

"That the said defects complained of in the

said vessel were *in truth and in fact a part of the original structure of said vessel* and were at all times visible to anyone in the cabin."

Mr. B. S. Murley, secretary and treasurer of appellant, swore to the petition (see p. 9 Tr.) before Mr. Beyers, who now contends so strenuously to the contrary for his client.

Whom shall we believe?—the naval architects in appellant's employ who so glibly testified that the floor and platform were not part of the hull? May we not rely on the sworn petition to the contrary aided by what is apparent in the photograph? It is idle in the extreme to argue that the very platform supporting seats and passengers which is fastened securely to cross timbers resting on the vessel's frames is not a part of the hull,—this contention is unworthy of serious thought.

It seems equally unworthy of reply to say that a warning notice posted in the cabin with appropriate words of warning calling attention to the sheer drop from platform to the aisle would not have given some aid to passengers.

The Cases Cited by Appellant.

Johnson vs. Port Washington Route, 121 Wash. 460, was not a maritime cause. It was an appeal from a judgment of non-suit which was affirmed. The presence of contributory negligence presupposes negligence of defendant. There can be no contributory negligence without primary negligence. In ad-

miralty, the damages would have been divided. It was non-maritime, for it occurred on a wharf. The court also observed:

> "There were no attendant circumstances which would distract her mind and cause her not to notice the distance between the end of the plank and the floor of the dock."

In the case at bar there were attendant circumstances such as—One hour's rest in a seat—the narrow rows—Mrs. Harvey's long coat and dress—the things of interest to be seen by looking out on the Sound, etc.

Dunn vs. Kemp & Hebert, 36 Wash. 183. In that case a customer was injured in a store by stepping into an open stairway. It was wholly different from this case. The customer openly walked into the stairway, wearing colored glasses to protect her eyes from light. The standard of care was different —ordinary care was the test.

Hollenback vs. Clemmer, 66 Wash., and *Hogan vs. Building Co.,* 120 Wash., are also widely different and beside the point here. Liability in each was measured by ordinary care. No statute appears to have attempted to regulate liability by punishing in damages any departure from the standard of a *perfect-non-defective place.*

The hull, under R. S. 4493, must be without *defect* or *perfect,* for if imperfect, or if it had imperfections, which is the word of the statute, the owner is liable.

Finally, appellant argues that appellee submitted the whole question of negligence to the District Court.

This we strenuously deny. In paragraph 6, page 14 of the Transcript, claimant (appellee) set forth that she did not intend to confer jurisdiction upon the District Court to hear the case upon its merits because of her desire to try the pending case against the company in the Superior Court of King County, Washington. In her prayer to her answer, page 17 Tr., appellee said:

> 1. "That said limitations be disallowed for the reasons herein set forth."
>
> At page 67, MR. MARTIN: "Your Honor, I think to shorten this matter and save time the best way would be to go right through with the case.
>
> THE COURT: I am not familiar with the statute here. Suppose the petition for limitation is denied, will the case be tried here on its merits?
>
> MR. MARTIN: I understand the practice to be that if the petition for limitation of liability fails the case is dismissed and we are permitted to proceed with our cause of action in the state courts." See Tr. 67, 68.

At pages 90, 91, the claimant (appellee) moved for a dismissal of the petition. At page 97, appellee again renewed her motion to deny the petition for limitation of laibility.

The statutes deal only with the substantive rights. The practice is governed by the rules. Noth-

ing in the rules calls for the making of a motion at the close of petitioner's case at the risk or peril of waiving the right to object to the right to limit. The claimant objected all through the proceedings to the court taking jurisdiction but in the nature of things was compelled to go into the merits as we are here for fear that if the right to limit is granted the claimant must show her right to a recovery because of petitioner's negligence or be foreclosed from any relief. Upon the proof submitted no purpose is shown to confer jurisdiction on the court, but in the orderly presentation of the respective claims and issues on each side appellee was bound to show appellant's negligence and the manner of receiving the injury as bearing on the right to limit as well as the necessity of showing negligence if a limitation should be granted.

Damages.

Items of damage:

Seattle General	$ 561.00
Drs. Dawson and Burch	550.00
Nurse hire	726.00
Ambulance	11.00
Wheel chair	17.50
Medicine	25.00
	$1,890.50

This was up to September 4th, 1924. See Tr. 75.

Since then appellee spent $325.00 for nurse hire

and attendance of a person to help her about, making a total of $2,215.50. Dr. Dawson testified that the charges were the usual and customary charges for services. Mrs. Harvey was injured December 17th, 1923. She sustained a fracture of the left thigh and the left arm above the wrist. See Dr. Dawson's testimony, p. 83 Tr. He said in answer to a question:

> "Q. And did the X-ray confirm the diagnosis as to the fracture in the hip joint and arm?
>
> A. Yes, there was a decided fracture in the hip joint, intracapsular fracture of the bones of the arm, which was very bad.
>
> Q. How long did you continue to treat Mrs. Harvey?
>
> A. Practically until she went back home last summer, she was under my care—sometime in June, 1925."

Mrs. Harvey was in a cast eight weeks and four months in bed before she was able to sit up. She left Seattle in June, 1925, to return to home in the East and was barely able to get to the automobile with assistance.

The injuries were of a permanent character. Her hand and wrist became permanently stiffened. A slight shortening of the leg resulted. The pain and suffering was great.

If the court should take jurisdiction it would ascertain the total injury, however, greatly in excess of the appraised value it might be. It would then

consider the question of mutual fault if any and then would limit the total recovery to an amount which would not exceed the appraisal, viz: $6,700.00. Suit for $12,500.00 was brought against appellant and is now pending in the state court.

We therefore ask:

1. That the decree of the lower court be affirmed.

2. If not, then in the alternative for an award of $6,700.00, which is equal to the appraisal, if a limitation is granted.

Respectfully submitted,

WINTER S. MARTIN,
HERMAN S. FRYE,
CLARENCE L. REAMES,
Proctors for Appellee.